

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

LEROY FEARS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 10-315
	)	Judge McVerry
	)	Magistrate Judge Bissoon
PENNSYLVANIA DEPARTMENT OF	)	
CORRECTIONS, <i>et al.</i> ,	)	
	)	
Defendant.	)	

**MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION**

**I. RECOMMENDATION**

For the reasons that follow, it is respectfully recommended that Plaintiff's Motion for Preliminary Injunction (Doc. 30) be denied.

**II. REPORT**

Plaintiff is a state prisoner who alleges that he was subjected to the unconstitutional use of excessive force in the application of handcuffs on July 28, 2008, and he seeks relief pursuant to 42 U.S.C. § 1983. Plaintiff now files a motion seeking preliminary injunctive relief because a phlebotomist at the prison, Brian Hice, injured him while taking his blood "on one particular morning" during the "period between July and September of 2009" (Doc. 30, p. 5). Plaintiff has his blood taken routinely to test for a medical condition, and he seeks an order that would either prevent Mr. Hice from drawing his blood, or would provide for all future encounters to be recorded on video. Plaintiff states that he did not notice his injury at the time his blood was drawn, but that his arm became swollen and purple where his blood had been drawn, and he experienced a "strong stinging, throbbing pain" (Doc. 30, p. 5).

In determining whether preliminary injunctive relief is warranted, a court must consider: (1) whether movant has shown a reasonable probability of success on the merits; (2) whether movant will be irreparably harmed by denial of the relief; (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and (4) whether granting the preliminary relief will be in the public interest. Bieros v. Nicola, 857 F.Supp. 445 (E.D. Pa. 1994). It “frequently is observed that a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.” Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (emphasis deleted). With respect to the “irreparable harm” prong, the Court of Appeals for the Third Circuit has emphasized that the “key aspect of this prerequisite is proof that the feared injury is irreparable; mere injury, even if serious or substantial, is not sufficient.” United States v. Commonwealth of Pennsylvania, 533 F.2d 107, 110 (3d Cir. 1976). Additionally, “a showing of irreparable harm is insufficient if the harm will occur only in the indefinite future. Rather, the moving party must make a clear showing of *immediate* irreparable harm.” Campbell Soup Co. v. Conagra, 977 F.2d 86, 91 (3d Cir. 1992) (internal quotations omitted, emphasis added); Adams v. Freedom Forge Corp., 204 F.3d 475, 488 (3d Cir. 2000) (harm may not be speculative).

Plaintiff’s motion is frivolous. The “assault” he describes is nothing of the sort, but is, instead, a common occurrence when one has blood drawn. In the alternative, even if the mishap in drawing his blood could reasonably be called an “assault,” the motion is still frivolous because this occurred once, almost a year ago, and was so unremarkable that Plaintiff can’t even remember the specific date (or even the month) it is alleged to have occurred. I.e., Plaintiff cannot in good faith allege that he will suffer irreparable harm if his motion is not granted.

### **III. CONCLUSION**

For the reasons set out in this Report and Recommendation, it is respectfully recommended that Plaintiff's Motion for Preliminary Injunction (Doc. 30) be denied.

In accordance with the Magistrate's Act, 28 U.S.C. § 636 (b)(1)(B) and (C), and Rule 72.D.2 of the Local Rules for Magistrates, objections to this Report and Recommendation are due by June 29, 2010. Failure to file objections may result in a waiver of the right to appeal.

June 15, 2010

s/Cathy Bissoon  
Cathy Bissoon  
United States Magistrate Judge

cc:

**LEROY FEARS**

CQ-7760

S.C.I. at Greene

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